Petition

Office - Supreme Court, U.S.
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81-702

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

GOLDFIELD DEEP MINES COMPANY OF NEVADA,
A Nevada corporation, etc. et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
IN CASE No.78-3096

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QUESTIONS PRESENTED

1. Whether Goldfield Deep Mines Company of Nevada ("Goldfield"), as a defendant, is protected by "Due Process" from being held liable, as a matter of law under California Corporation Code Section 2103, in an action brought by the United States Forest Service, Department of Agriculture, in the name of the United States, in the United States District Court, Central District of California.

2. Whether a partial summary judgment restraining Goldfield from operating mining claims until it should obtain an approved operating plan from the Forest Service can be enlarged by the Clerk issuing ex parte under Rule 70 F.R.C.P. a writ of assistance authorizing taking possession of Goldfield's mill and mining equipment of the value of $350,000, cutting it up, burying it, and selling it as junk for $750.

3. Whether the regulations of the U.S. Forest Service, 36 C.F.R. §252, establishing a permit system prohibiting and restricting mining, are inconsistent with acts of Congress, 30 U.S.C. §22, which grants to citizens the right to "exploration and purchase" of valuable mineral deposits and the right to occupy and purchase "the lands in which they are found", and 30 USC §612 (b),(c), which limit the United States' right to … manage the surface of mining claims by the proviso: "Provided, however, that any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto."

4. Whether the individual non-operator defendants can be held liable for Goldfield's failure to obtain an approved

operating plan, when the only operator was Goldfield and not the individual defendants.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following were named as parties defendant: C. Orin Swain, individually, and C. Orin Swain, as officer and agent of Goldfield Deep Mines Company of Nevada; John C. Rebenstorf, individually, and John C. Rebenstorf, as officer and agent of Goldfield Deep Mines Company of Nevada; Frank Montgomery, individually and Frank Montgomery, as officer and agent of Goldfield Deep Mines Company of Nevda; Oscar C. Wagner, individually, and Oscar C. Wagner, as officer and agent of Goldfield Deep Mines Company of Nevada; Elmer Billman, individually, and Elmer Billman, as officer and agent of Goldfield Deep Mines Company of Nevada; Frank Maka, individually, and Frank Maka, as officer

and agent of Goldfield Deep Mines Company of Nevada; Fenton T. Hudson, individually, and Fenton T. Hudson, as officer and agent of Goldfield Deep Mines Company of Nevda; Howard Ogden; B. M. Rebenstorf; Charles DeGroff; Jack Pieden; Ray Martin; Bob Hudson; and James Justice.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit in Case No. 78-3096 is reported at 644 F2d 1307. It is set out in the Appendix hereto A-1 to A-8..

The District Court for the Central District of California did not write any opinion. The Findings of Fact and Conclusions of Law and the Partial Summary Judgment for Injunctive Relief, lodged by the plaintiff when its Motion for Partial Summary Judgment for Injunctive Relief was filed, February 16, 1977, prior to the filing of any answer or responsive pleading by defendants, and signed by the court March 7, 1977, are set forth in the Appendix hereto. A-11

JURISDICTION

This petition for writ of certiorari is timely filed within 90 days from July 14, 1981, when the United States Court of Appeals for the Ninth Circuit entered its order denying petition for rehearing. A-9) of the decision entered May 11, 1981.

The statutory provision believed to confer jurisdiction on this Honorable Court is 28 U.S.C. Section 1254.

CONSTITUTION, STATUTES AND REGULATIONS CITED

The "Due Process" clause of the Constitution of the United States is so well known to the Court that it is not set out.

The pertinent portions of the California Corporations Code §2203 (a) and (c) are set out in the Appendix A-28-29.

The pertinent portions of the United States Code, Title 30 §§ 22 and 612 (b)(c) are set forth A-29-30, and the pertinent part of the U.S. Forest Service regulations 36 C.F.R. §252 is set forth A-31.

STATEMENT OF THE CASE

The facts material to the consideration of the substantive and due process questions presented justify review by this Honorable Court.

The United States Forest Service took possession of mining claims which Gold-

field Deep Mines Company of Nevada (Goldfield") was occupying strictly for mining purposes. Goldfield was diligently developing the claims and had constructed a milling or processing plant to extract from the ore on the claims tungsten, platinum group minerals, gold and silver.

Goldfield had invested $350,000.00 in equipment and plant. The agency destroyed Goldfield's plant, cut up and buried its installation and hauled off its equipment and sold it for junk for $750.00. The Forest Service obtained a judgment against Goldfield and each of the individual defendants for $17,560.00 and costs of $515.72.

The United States District Court for the Central District of California had jurisdiction under 28 U.S.C. §1345.

On January 26, 1977, at the request of the Forest Service, the regional United States Attorney filed a Complaint

against Goldfield and fourteen individuals, officers or employees of Goldfield, alleging that Goldfield had not qualified to do business in the State of California and in violation of the Forest Service regulations had conducted a mining and milling business on mining claims in National Forest lands without first obtaining from the Forest Service written approval of a Plan of Operations. Plaintiff complained that Goldfield's operations had involved road building on the mining claims and disturbance to surface and vegetation and that Goldfield had filed a legal action in the San Bernardino Superior Court to restrain Forest Service agents from acting within the scope of their employment.

The trial court denied to defendants substantive and procedural "Due Process", and the Court of Appeals for

the Ninth Circuit affirmed.

"Due Process" was denied in the following particulars:

(1) The Clerk of the District Court rejected prematurely affidavits and answers timely filed by individual defendants pro se. Examination of the docket sheet as certified March 1, 1977 by the Clerk shows that the official docket sheet then contained the entry: "2/25/77 (13) Fld. defts in pro per ANSWER COUNTERCLAIM." The docket sheet was subsequently falsified by erasure of this entry and renumbering of the docket entries. This evidence was submitted to the Court of Appeals.

At the trial in 1978 Ms. Tolin, then Special Assistant U.S. Attorney for Forestry admitted:

> "MS. TOLIN: I have gone through my records this morning, and I do find that we received a copy of the Answer on February 25th.

> But, as we had understood it had not been actually filed by the clerk, it wasn't in my ordinary sequence of pleadings, so I had overlooked it. (Emphasis supplied.)

Premature entry of default prevented these defendants from presenting their defenses. The individual defendants had the right to appear pro se.

(2) The district court entered prematurely a partial summary judgment for injunctive relief, and thus foreclosed trial on the issue of liability, prior to expiration of ten days to answer plaintiff's motion under Rule 56 F.R.C.P.

(3) Goldfield's liability under the partial summary judgment was based on the premise that Goldfield was liable because it could not defend itself in California for alleged failure to qualify to do business in California as a foreign corporation. Under the California Corporation Code §2203 (A-28) Goldfield could not initiate a case in California,

but it had the constitutional right under "Due Process" to defend itself in a case brought against it in California. American DeForest Wireless and Telegraph Co. v. Superior Court, 153 Cal 533 (1908).

(4) The trial court entered its partial summary judgment prematurely, two years before the initial decision of an administrative law judge in Contest CA 4185 was rendered concerning the validity of the claims. All the evidence in the case showed that Goldfield was occupying each of its claims for the "prospecting, mining or processing activities and activities reasonably incident thereto" which the mining laws of the United States specifically authorize. 30 U.S.C. §612(b),(c). There was no showing of any use of the claims for any non-mining purpose. The claims were in good standing, and Goldfield was

working diligently to develop the claims into a paying mine. Goldfield's occupation of the claims, which it had purchased, was not a trespass on national forest land.

(5) The partial summary judgment was also based on the ground that although Goldfield had filed notice of intention to operate under 36 C.F.R.§ 252, it had not filed its plan of operation as demanded by the agency. Goldfield was doing preliminary work necessary to formulate an operating plan.

(6) Forestry offered no proof that any of the named individuals was required under the regulations to apply for approval of an operating plan. The regulation, 36 C.F.R. §252.3(b) defines "Operator" as "a person conducting or proposing to conduct operations." The operator was Goldfield, not any of the individual defendants. The individual

defendants were not operators; they were not entitled to apply for an approved operating plan under Forestry regulations. They cannot be held liable for not doing something which the regulations did not permit them to do. In the absence of proof of acts constituting trespass on the part of each individual, plaintiff did not create any basis for entering judgment against the individual defendants. Nothing in plaintiff's affidavits filed to support the motion for partial summary judgment would show that the individual defendants acted in concert, and there was no basis for entering judgment against the individual defendants as joint tort-feasors.

(7) The partial summary judgment upon which liability is predicated does no more than require defendants to cease operations until such time as they obtain from the Forest Service written approval of a plan of operations. (A-19).

Paragraph 3(c) of the decree for injunctive relief, signed March 7, 1977, restrains defendants "from conducting any business operations whatsoever upon said subject area without first obtaining a permit from the United States Forest Service." It enjoins defendants from "maintaining its structures for the purpose of advertising and conducting a mill site business operation upon said lands without a permit." The decree does not command defendants to remove their structures and mill. It does not prohibit defendants from maintaining their structures without operating them in anticipation of resuming business operations after obtaining the required permit.

(8) The ex parte writ of assistance was not based upon an order for delivery of "possession" of property. The writ of assistance was not authorized under Rule 70 F.R.C.P. which provides:

> "When any order or judgment is for the delivery of possession, the party in whose favor it is made is entitled to a writ of execution or assistance upon application to the clerk."

But plaintiff obtained ex parte the next day from the clerk of the district court a writ of assistance which expanded the order to stop work temporarily pending obtaining of a permit from the Forest Service into an order for removal of defendant's mill and mining property (A-24), a needless and wanton destruction of defendants' property in violation of their rights under the Fifth Amendment to the Constitution.

(9) The Court of Appeals declined to consider Goldfield's petition for writ of mandamus due to the fact that Goldfield was not represented by an attorney at law, citing In Re Highley, 459 F2d 554 (9th Cir. 1972). It did not affirm the action taken theretofore by the District court. (A-10).

(10) The District Court allowed the ex parte Writ of Assistance to be carried out without hearing defendants' timely filed motions to alter and vacate the decree for injunctive relief and motions to stay execution, vacate and set aside the writ of assistance, and to rule on their opposition to the findings and conclusions entered March 7, 1977, on plaintiff's motion for partial summary judgment for injunctive relief.. Defendant's motions were later denied as moot after destruction of Goldfield's property.

(11) Although an Amended Complaint which raised again the issue of liability was served by summons upon defendants by Ms. Tolin, and defendants answered denying liability, Goldfield then being represented by counsel, the trial court prohibited defendants from offering any evidence on the issue of liability at the jury trial held in 1978, which was

limited by the trial judge to the issue of damages. He instructed the jury: "The only thing we have in front of us today is the question of damages."

REASONS FOR GRANTING THE WRIT

The court below sanctioned a departure from the usual course of judicial proceedings which calls for an exercise of this Court's discretionary power of supervision.

The charge and finding of liability predicated on Goldfield's failure to qualify under California Corporation Code §2003 is untenable. The statute prohibits Goldfield from using the California court to bring a case, but it is a denial of "Due Process" to prohibit Goldfield from defending this case brought against the corporation.

This Honorable Court has never upheld issuance of an injunction which would evict mining claimants and require

removal of their mining equipment from the claims in the absence of final determination that the mining claims were invalid. Here, no final determination has been made by the Interior Department's administrative tribunals as to the validity of the locations under which Goldfield was operating, and there is no authority, either in statutory or common law, which would support the unnecessary destruction of Goldfield's property.

The decision appealed from contradicts the precedents established by the Court of Appeals for the Ninth Circuit in its own previous cases concerning injunction against operations on mining claims and the practice of district courts in other cases.

The procedure followed here, of permitting the plaintiff to eject the defendants, to demolish their mill, obliterate the improvements made on their mining

claims, and to remove and sell their equipment without waiting for final adjudication of the pending administrative proceeding to determine whether the locations are valid, was specifically disapproved by the Ninth Circuit in United States v. Barrows, 404 F2d 749, 752 (9th Cir. 1968), where the court stated:

> "Unless and until a final determination is made as to the claim's validity, the Government, short of a condemnation proceeding, would probably not be entitled to enter upon the claim or to require defendants to move their plant."

Even after administrative invalidation of Barrows' claim was affirmed by the District Court, enforcement of an order for the removal of Barrows' mining equipment was stayed during the pendency of further appeals to the Ninth Circuit. The District Court did not permit, as was done here, removal of the machinery before completion of judicial

review proceedings. Barrows v. Hickel, 447 F2d 80 (9th Cir. 1971).

In United States v. Springer, 478 F2d 43 (9th Cir. 1972), after defendants had been found to be using mining claims for other than legitimate mining purposes, the Ninth Circuit upheld a preliminary injunction which merely prohibited use or occupation of the claims other than for legitimate mining purposes. Complete ejectment of defendants from the premises was made to wait until the District Court sustained final administrative action which invalidated Springer's mining claim locations.

Similarly, the District Court for Colorado followed Barrows in United States v. Foresyth, 321 F Supp 761, where, to prefent irreparable damage to scenic public lands which would result from the defendants' planned removal of several

thousand tons of limestone, a temporary injunction was issued merely to halt mining during pendency of administrative determination as to the validity of the mining claims.

In United States v. Curtis-Nevada Mines, Inc.,415 F Supp 1373 (1976), the District court for the Eastern District of California enjoined the defendants from blocking access to their claims for permitted hunting, camping, hiking, or access to adjoining lands, and ordered cessation of mining operations on claims within national forest lands administered by the Forest Service pending the filing of an operations plan.

Here, the writ of assistance went beyond the scope of injunctive relief ordered by the court below. The court's order purported to do no more than require defendants to cease operations until such time as they should obtain

from the Forest Service written approval of a plan of operations. The decree does not command defendants to remove their structures and mill. It is not an order for delivery of possession of the property. See A-19. Rule 70 F.R. C.P. does not authorize issuance of a writ of assistance ex parte upon application to the clerk except when the court's order is for the delivery of possession.

A writ of assistance, like a writ of replevin, cannot be issued ex parte without prior notice and hearing necessary to satisfy "Due Process". Fuentes v. Shevin, 407 U.S. 66 (1972). Here, defendants' efforts to obtain a hearing were frustrated by hasty execution of the improperly issued writ of assistance, which commanded the marshal to "cause the removal" of Goldfield's structures and mill and mining equipment. See A-24.

This shocking departure from the usual course of judicial proceedings calls for review of the case by this Court in the exercise of its duty to supervise the administration of justice by the inferior federal courts. If allowed to go uncorrected, this precedent will encourage the Forest Service to interfere with other miners' "prospecting, mining or processing operations" authorized by 30 U.S.C. §612(b),(c).

Not having an approved operating plan is not a crime punishable by obliteration of the mining claimant's operation and forcible seizure of his mining claims and equipment. This Court has recognized that unpatented mining claims are property in the highest sense of the term. Wilbur v. United States ex rel. Krushnic, 280 U.S. 306. But unless this Court will review and correct this instance of agency abuse of judicial power,

the statutory rights conferred by Congress to occupy and pursue mining activities on national forest lands will be reduced to a mere privilege, dependent upon the pleasure of the district Forest Service.

When a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, it is appropriate for this Court to grant certiorari.

The appellate court below held in effect that the requirement for a permit approving mining operations under 36 C.F. R §252.4 is an indispensable precondition to the mining activities authorized by Congress in 30 U.S.C. §612 (b)(c). The appellate court has thus sanctioned a rewriting by administrative legislation in a regulation invented by the Forest Service of the mining law as enacted by Congress.

The mining law grants to citizens the rights to explore and purchase valuable mineral deposits and to occupy and purchase the lands in which they are found. 30 U.S.C. §22. The statute limits the regulation of mining claims by the proviso that "Any use of the surface by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations, or uses reasonable incident thereto." 30 U.S.C. §612 (b).

Agency regulations and their enforcement by the agency under a permit system cannot operate to repeal the mining law enacted by Congress and reaffirmed by Congress in the Mining and Mineral Policy Act of 1970, 74 Stat. 1876. Congress, not the Forest Service, writes the laws. See Baker v. United States, 615 F2d 224 (9th Cir. 1980)

The appellate court below failed to recognize the mining statutes. Its decision was more stringent than the Forest Service interpretation of the mining law in Chapter 2850 of the Forest Service Manual "1872 Act Use Regulations" June 4, 1975. The Manual recognizes:

> "The prospector and miner have a statutory right,(not a mere privilege) under the 1897 Organic Act to enter upon the National Forests for prospecting and mining. Their rights to do this cannot be unreasonably restricted or made excessively burdensome.
>
> * * * *
>
> "The regulations do not prohibit specific activities which cause adverse environmental effects."
>
> "§2850.2 Objective. The objectives in administering the 1972 Act use regulations are to:
> * * * *
>
> "3. Avoid materially endangering or interfering with prospecting, exploration, mining and mineral processing operations, as well as uses reasonably incident to such uses of National Forest System lands.

> "The Forest Service is not authorized to manage locatable mineral resources in National Forests; it is the responsibility of the Department of the Interior to administer the 1872 Act. Neither is the Forest Service directly concerned with methods and techniquest of prospecting, exploration, mining or mineral processing, except to the extent that certain methods and techniques can have greater or lesser environmental impacts. Minerals are as much a part of the natural resources in National Forests as are outdoor recreation opportunities, fish and wildlife, forage, water, timber and natural beauty."

How can the individual non-operator defendants be faulted for not obtaining an approved operating plan, when Goldfield was the operator required by the regulation to obtain one?

Goldfield is a public corporation organized over sixty years ago, with over 5,000 public stockholders.

CONCLUSION

We have shown under our statement of the case specific deprivations of "Due

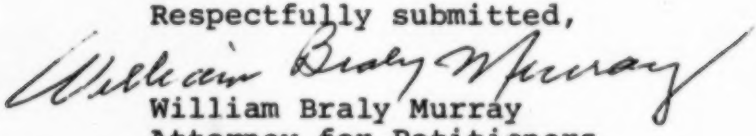
Process". Under "Due Process", the defendants are entitled to a fair trial. Wong Yang Sung v.McGrath, 339 U.S. 33.

The harm caused by the departure made in this case from the usual course of judicial proceedings will not be limited to the loss experienced by Goldfield and by the individual defendants who have been penalized for Goldfield's not having an approved operating plan, which they individually had no right to apply for. The case threatens to undermine the legal status of all the miners who operate mining claims on public lands. The danger that this case will be a creeping precedent to make agency policy superior to the mining law enacted by Congress makes this case sufficiently important to deserve review by the Supreme Court.

For the foregoing reasons, the petitioners respectfully pray for review

of this case upon writ of certiorari.

Respectfully submitted,



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October 8, 1981

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GOLDFIELD DEEP MINES COMPANY OF NEVADA, a Nevada corporation, C. ORIN SWAIN, individually, and C. ORIN SWAIN, as officer and agent of Goldfield Deep Mines Company of Nevada; JOHN C. REBENSTORF, individually, and JOHN C. REBENSTORF, as officer and agent of Goldfield Deep Mines Company of Nevada; FRANK MONTGOMERY, individually, and FRANK MONTGOMERY, as officer and agent of Goldfield Deep Mines Company of Nevada; OSCAR C. WAGNER, individually, and OSCAR C. WAGNER, as officer and agent of Goldfield Deep Mines Company of Nevada; ELMER BILLMAN, individually, and ELMER BILLMAN, as officer and agent of Goldfield Deep Mines Company of Nevada; FRANK MAKA, individually, and FRANK MAKA, as officer and agent of Goldfield Deep Mines Company of Nevada; FENTON T. HUDSON, individually, and FENTON T. HUDSON, as officer and agent of Goldfield Deep Mines Company of Nevada; HOWARD OGDEN; B. M. REBENSTORF; CHARLES De GROFF; JACK PIEDEN; RAY MARTIN; BOB HUDSON; and JAMES JUSTICE,

Defendants-Appellants

No. 78-3096

OPINION

Appeal from the United States District Court for the Central District of California

Decided May 11, 1981

Before CHOY, FERGUSON, and REINHARDT, Circuit Judges

CHOY, Circuit Judge:

Goldfield Deep Mines Company operated a mining and milling business on federal forest lands in violation of several state and federal regulations. The United States sued for trespass, seeking injunctive relief and damages. We affirm the district court's award of the requested relief.

I. Facts

Goldfield, a Nevada corporation, and its various officers, directors, and agents (herein collectively referred to as "Goldfield") engaged in a pattern 1/ of deliberate violation of government regulations. An ongoing feud developed between Goldfield and the Forest Service, beginning in 1976.

Goldfield claimed the right to mine in the national forest reserve in San Bernardino, California, and began mining and milling operations there. This claim was later successfully refuted in proceedings before an administrative law judge of the Depart-

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1. The defendants knowingly failed to comply with numerous state and federal regulations:
   1. The officers were found guilty of securities fraud and ordered to cease selling securities.
   2. Goldfield did not qualify to transact business as a corporation in California.
   3. Goldfield conducted welding on forest lands without a permit in violation of fire regulations.

ment of Interior. 2/ Goldfield cut trees, dug roads, and used heavy equipment and machinery in the area. Forest rangers encouraged Goldfield to file an operating plan and to obtain proper authority to conduct business on forest land. Goldfield refused to do so.

The Government brought an action for trespass and a partial summary judgment for injunctive relief was granted on March 8, 1977. The court found Goldfield liable for trespass.

The Government sought to enforce the judgment and again encountered Goldfield's noncooperation. The district court granted a writ of assistance ordering the United States Marshal to remove Goldfield's structures and equipment from, and to prevent further mining and milling operations on, the forest land. Goldfield's petition for mandamus against enforcement of the judgment was denied by this court. 3/

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2. See Ernest C. Downs, United States Department of Interior Office of Hearings and Appeals, Contest Nos. CA-4185, 4920 (Feb. 14, 1979).
   The ALJ found that Goldfield did not have a valid claim to a mineral discovery. A valid discovery--one which would justify a prudent person's expenditure of labor and means--would permit mining on forest lands. The Government's mineral examiner testified that there were no significant minerals on Goldfield's claim. Goldfield's self-taught "expert" witnesses claimed that platinum and valuable minerals existed on the claim,

The marshal executed the judgment and Goldfield failed to retrieve the seized equipment despite repeated notice to do so. The equipment, which Goldfield claims was worth $350,000, was eventually sold for $750.

The Government filed an amended complaint for the cost of enforcing the partial summary judgment and for the anticipated cost of restoring the heavily damaged forest land to its original condition.

A jury trial was held solely on the issue of damages. The district court refused to entertain Goldfield's substantive arguments because the trespass issue had already been determined in the earlier partial summary judgment proceeding. The Government was awarded damages totalling $17,560. The district court denied Goldfield's motion for a new trial and judgment was entered nunc pro tunc February 24, 1978. This appeal followed.

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which could be extracted by secret methods and located at secret drill-hole sites, but presented no concrete evidence.

The ALJ's decision quoted a California State Mineral Information Service publication which stated: "There are no platinum mines in California...Extreme caution is advisable when dealing with persons or organizations who reportedly own or claim to know of deposits in California that contain large amounts of platinum."

3. Rebenstorf v. United States District Court, No. 77-1684 (9th Cir. March 24, 1977) (order denying writ of mandamus).

II. Discussion

Goldfield claims that the proceedings below violated its right to due process and that the United States Forest Service ("Forest Service") has no authority to interfere with mining claims. We find that the defendants violated properly promulgated Forest Service regulations and that this violation was finally determined in the partial summary judgment proceeding. The district court was correct in limiting the trial to damages. The defendants had proper notice of all proceedings below and no due process violation occurred.

A. Forest Service Regulation of Mining Activity on U. S. Forest Land

[1] The Forest Service may properly regulate the surface use of forest lands. While the regulation of mining per se is not within Forest Service jurisdiction, where mining activity disturbs national forest lands, Forest Service activity is proper. See United States v. Weiss, 642 F2d 296, at 298 (9th Cir. 1981) (Secretary of Agriculture has "power to adopt reasonable rules and regulations regarding mining operations within the national forests"); United States v. Richardson, 599 F2d 290 (9th Cir. 1979), cert. denied, 444 U.S. 1014, 100 S. Ct. 663, 62 L.Ed 2d 643 (1980) recognizing the conflict between mining and forest land policies and holding that the district court may properly enjoin unreasonable destruction of surface resources.) In this case, defendants cut trees, dug roads, erected structures, moved earth and otherwise damaged forest surface land. The Forest Service may properly regulate such activity.

[2] Goldfield claims that the Government should have exhausted its administrative remedy by challenging Goldfield's mining claim before the Department of Interior. This is an alternative remedy which the Government successfully pursued. See n.2 supra. However, the right to protect Forest Service lands from waste is separate from and in addition to the right to challenge mining claims. The jurisdiction of the Department of Interior is not to the exclusion of the district court's. See United States v. Nogueira, 403 F2d 816, 825 (9th Cir. 1968). There was no need to exhaust the mining-claim proceedings before enjoining destruction of forest lands.

[3] Goldfield also argues that the act[4] authorizing Forest Service enforcement of its regulations is unconstitutional under the void-for-vagueness principle of the fifth and sixth amendments. See Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 619, 83 L.Ed. 888 (1939). The act provides that the Secretary of Agriculture shall adopt regulations and that prior to such adoption he shall administer the regulations in effect at the time the act was passed "to the extent practical." the Forest Service specifically told Goldfield of the regulations with which it was required to comply. Goldfield does not claim that the regulations were in any way unclear or that it failed to understand their requirements. Rather, it questions the legality of the Secretary's determining which regulations remain in effect prior to the adoption of new regulations. Thus, in essence, Goldfield's argument is not

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4. 43 U.S.C. §1733.

void-for-vagueness claim, but rather an assertion that there was an improper delegation of authority to the Secretary. There is no merit to this argument. Congress may delegate to an agency head the authority to promulgate regulations which implement an act. Schecter Poultry Corp. v. United States, 295 U.S. 495, 500, 55 S. Ct. 837, 838, 79 L.Ed 1576 (1935). A fortiori, Congress may authorize an agency head to retain existing regulations except for those no longer practical because of the adoption of new legislation. While a legitimate issue might be presented if a party were unable to determine which regulations remained in effect and which did not, such is clearly not the case with Goldfield.

B. Due Process Claims

Goldfield contends that the summary judgment proceeding, the sale of Goldfield's property and the trial on damages each constituted a violation of due process.

[4] Goldfield was properly served and had ample notice of all the proceedings against it. There were no genuine issues of material fact at the time the partial summary judgment was entered. The record shows no affidavits then before the district court which would negate a finding of trespass. Further, the defendant in correspondence and depositions admitted conducting mining and milling operations on forest lands and admitted failure to file an operating plan. The Government on the other hand, submitted documentation and affidavits supporting its allegations. This is precisely the type of case in which summary judgment is appropriate. See

Fed. R. Civ. P. 56(e). The trial court correctly limited trial to the question of damages.

Once the summary judgment was entered and this court refused to issue a mandamus order staying execution, Goldfield was bound by the terms of the judgment. We find that the judgment was properly enforced.

[5] Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed 2d 556 (1972), and the line of due process cases governing replevin and sale of personal property safeguard against ex-parte, nonjudicial seizures of personal property. See e.g. Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed2d 406 (1974). These cases are inapplicable here. In this case Goldfield had continual and repeated notice of the claims against it and of the proposed sale of the property. The Government sought judicial approval in adversary proceedings. The seizure and sale were judicially authorized, and the sale took place only after Goldfield failed to make any attempt to recover its goods.

III Conclusion

Goldfield and the individual defendants were finally and properly determined to be liable for trespass. There is no valid constitutional, procedural, or statutory argument against the district court's partial summary judgment. The seizure and sale of Goldfield's property comported with the requirements of due process, and damages were properly awarded.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GOLDFIELD DEEP MINES COMPANY OF NEVADA, a Nevada corporation, et al.,

Defendants-Appellants

No. 78-3096

ORDER Filed July 14, 1981

Before: CHOY, FERGUSON, and REINHARDT. Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN C. REBENSTORF, GOLDFIELD DEEP MINES COMPANY OF NEVADA, ET AL.,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent

UNITED STATES OF AMERICA,

Real Parties in Interest.

No. 77-1684 March 24, 1977

ORDER

Before: GOODWIN and SNEED, Circuit Judges

Upon due consideration the petition for writ of mandamus is denied and the injunction heretofore issued is vacated. The corporation which claims to own the contested mining claims is not represented by attorney and thus is not properly before this court. In re Highley, 459 F2d 554 (1972). Furthermore, the U. S. may seek judicial assistance in obtaining immediate possession over a

disputed mining claim... Best v. Humboldt Placer Mining Co., 371 U.S. 334

/s/ Alfred Goodwin

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GOLDFIELD DEEP MINES COMPANY OF NEVADA, A NEVADA CORPORATION: etc., et al., Defendants.	Civil No. 77-0307-LEW Filed March 7, 1977 Lodged Feb. 16, 1977

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR INJUNCTIVE RELIEF

Plaintiff's Motion for Partial Summary Judgment for Injunctive Relief having come on regularly before the Court for hearing, and the Court having heard oral argument, and having considered the files and records before the Court, and having determined that no issue of material fact exists to be tried upon the issue of Partial Summary Judgment for Injunctive Relief, and having determined that upon the established and undisputed material facts, plaintiff is entitled to have Judgment summarily entered herein in its behalf on said issue as a matter of law, the Court herewith makes the following:

FINDINGS OF FACT

1. The lands which are the subject of this action are located in San Bernardino County, State of California, within the jurisdiction of this Court. The defendant, Goldfield Deep Mines Company of Nevada, A Nevada Corporation, has major places of business in San Bernardino County, California. The other defendants herein named are residents within the Central District of California within the jurisdiction of this Court.

2. During all times mentioned in plaintiff's Complaint the defendant, Goldfield Deep Mines Company of Nevada, A Nevada Corporation, was doing business in the State of California without having qualified to do intrastate business in said State in violation of Section 2103 of the California Corporation Code revised effective January 1, 1977.

3. The plaintiff, United States of America, at all times herein mentioned has been and now is the owner in fee of that certain real property situated within the boundaries of the San Bernardino National Forest in the County of San Bernardino, California, more particularly described as:

> Sections 26, 27, 34 and 35 of Township 2 North, Range 6 West, San Bernardino Base and Meridian.

4. During the month of March, 1976, the defendant, Goldfield Deep Mines Company of Nevada, obtained a quitclaim deed to certain alleged unpatented mining claims upon plaintiff's above-described National Forest lands. The location and names of

said alleged claims are depicted on a xerox copy of a portion of Geological Survey Map, Devore, California, being the NW 1/4 San Bernardino Quadrangle. Said copy delineating the location of the alleged claims of Goldfield Deep Mines Company of Nevada is attached as Exhibit "1" hereto.

5. As a foreign corporation which has not qualified to do business in California, the defendants have been and are conducting a milling and processing business enterprise upon plaintiff's said National Forest Lands without obtaining a permit from the Forest Service, and in violation of Chapter II of 36 Code of Federal Regulations, Section 261.11(b).

6. The defendants have undertaken, continue to undertake and threaten to continue to undertake mining operations upon the said National Forest Lands significantly and excessively disturbing and damaging the surface resources and defacing the mountainous terrain of plaintiff's National Forest Lands without first obtaining an Approved Plan of Operations from the Forest Service in wilful and unlawful violation of 36 C.F.R., Section 252.2

7. The defendants have unlawfully cut and bulldozed a new road across the alleged mining claims denominated the Brag, Brag Extension No. 1 and Brag Extension No. 2, and have widened and reconstructed and are maintaining a road across the alleged Atlast Mining Claim in violation of 36 C.F.R. 252.12 which requires an approved Plan of Operations before such road construction or maintenance can be undertaken in the National Forest, and defendants have thereby caused lasting and irreparable damages to plaintiff's National Forest Lands. The defendants threaten to con-

tinue violation of said Section 252.12 of 36 C.F.R. and will do so unless enjoined and restrained by Order of this Court.

8. The Court finds that agents of plaintiff have both orally and in writing notified defendants of the requirement that they obtain an Approved Plan of Operations. The Court finds that despite repeated notices to defendants that they must obtain an Approved Plan of Operations, defendants have willfully and unlawfully in violation of 36 C.R.R., Sections 252.1, 252.2, 252.3, 252.4, 252.5 and 252.6 continued to cut into and dig up and excessively disturb the surface and vegetation upon plaintiff's National Forest Lands, and threaten to and will continue to do so unless restrained and enjoined by this Court.

9. The defendants have wilfully and in unlawful violation of 36 C.F.R. 252.11 undertaken welding without a permit in the subject area of National Forest Lands in violation of the Uniform Fire Code of San Bernardino Ordinance 2011, Appendix "E", after repeated warnings from plaintiff's agents not to do so, and threaten to and will continue said welding without a permit unless enjoined and restrained by this Court.

10. The defendants have ordered Forest Service Officers not to come upon said alleged mining claims for the legitimate purpose of inspecting the mining operations as required by 36 C.F.R., Section 252.7 and in violation of 36 C.F.R. 261.1 have threatened legal action against said Forest Officers if they come upon said

National Frest Lands, and have in fact as shown by Court records in the case of Goldfield Deep Mines Co. of Nevada, A Nevada Corporation v. James R. Mason, Jr., et al., Civil No. 76-3896-LEW, taken legal action in the Superior Court of San Bernardino County, California, in an attempt to prohibit the agents of plaintiff from activities within the scope of their employment in the protection and administration of said National Forest Lands all in willful and unlawful violation of the aforesaid provisions of the Code of Federal Regulations. The intimidation and threats against plaintiff's agents by defendants have been and are such that plaintiff's agents have been and are unable to go upon plaintiff's said National Forest Lands unless accompanied by armed Security Guards. The Court finds that the defendants will continue acts of interference with and intimidation of Forest Service Officers unless restrained and enjoined by Order of this Court.

11. The Court finds that the defendants are unlawfully maintaning bulldozers and other heavy duty mining equipment upon the said alleged unpatented mining claims for the purpose of their operations without first obtaining an Approved Plan of Operations from the United States Forest Service.

12. The plaintiff, United States of America, is, and will continue to be resisted and impeded and interfered with in the exercise of its lawful rights with respect to the protection, administration and control of its said National Forest Lands unless the defendants are enjoined by the Court from their trespass actions, and from infringement upon the paramount

rights of the United States to said lands.

Based upon the foregoing Findings of Fact, the Court makes its:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter of the above-entitled action pursuant to 28 U.S. C. 1345.

2. The plaintiff, United States of America, is now and at all times herein mentioned has been the fee owner and entitled to protect, preserve and administer the San Bernardino National Forest Lands described in its Complaint herein filed on January 26, 1977.

3. Plaintiff is entitled as a matter of law to have compliance with and the full enforcement of the provisions of Volume 36, Code of Federal Regulations as promulgated by the Secretary of the U.S. Department of Agriculture. Mountain States Telephone and Telegraph Company v. United States, (1974) 499 F2d 611, 613, and cases there cited.

4. The acts and conduct of the defendants as hereinabove set forth in the Court's Findings of Fact were and are without any lawful right, permission or authority and constitute a continuing trespass upon plaintiff's said National Forest Lands, and constitute an unlawful and wrongful undertaking by the defendants to exercise exclusive control and dominion over said National Forest Lands in violation of the Regulations of the Secretary of Agriculture as set forth in 36 C.F.R.

5. The plaintiff is entitled to entry of a Partial Summary Judgment for Injunctive Relief to restrain and enjoin defendants from any and all further violations of the provisions of 36 C.F.R.

6. The Court reserves jurisdiction to determine the issue of damages and restoration costs and to award and tax costs.

7. The Court reserves jurisdiction to enforce all of its Orders herein made.

8. Any finding which should be deemed a conclusion of law is hereby adopted as such.

9. In accordance with the foregoing Findings of Fact and Conclusions of Law, let Partial Summary Judgment for Injunctive Relief be entered enjoining and restraining defendants from further violations of any and all provisions of Volume 36 of the Code of Federal Regulations.

DATED: This 7th day of March, 1977.

Laughlin E. Waters
United States District
Court Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GOLDFIELD DEEP MINES COMPANY OF NEVADA, A NEVADA CORPORATION; et al., Defendants.	Civil No. 77-0307-LEW PARTIAL SUMMARY JUDGMENT FOR INJUNCTIVE RELIEF Lodged 2-16-77 Filed March 7, 1977

Plaintiff's Motion for Partial Summary Judgment for Injunctive Relief having come on regularly before the Court for Hearing, the Court having heard oral argument thereon and having considered the files and pleadings herein, and the Court having signed and filed its Findings of Fact and Conclusions of Law in accordance therewith, and the Court having determined that there are no facts to be tried on plaintiff's said Motion, and that upon the undisputed facts plaintiff's said Motion should be granted.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is the owner in fee simple title of the National Forest Lands situated within the San Bernardino National Forest, County of San Bernardino, State of California, more particularly described as:

Sections 26, 27, 34 and 35 of
Township 2 North, Range 6 West,
San Bernardino Base and Meridian.

2. Plaintiff is entitled to full compliance with all the provisions of Volume 36 of the Code of Federal Regulations which consists of Regulations promulgated by the Secretary of Agriculture for the preservation and protection of said National Forest Lands.

3. The defendant, Goldfield Deep Mines Company of Nevada, A Nevada Corporation, and each of the defendants herein named, and all persons and entities of whatsoever nature in active concert or participation with them who receive actual notice of this Judgment by personal service, or otherwise, and all officers, agents, servants, employees, accountants, assignees, lessees and attorneys of Goldfield Deep Mines Company of Nevada, A Nevada Corporation, are each and all hereby restrained and enjoined:

(a) From building, reconstructing, maintaining or using roads upon the subject National Forest Lands without first obtaining an Approved Plan of Operations from the United States Forest Service in writing.

(b). From further digging, extracting materials and/or removing, and/or disposing of any materials whatsoever from the said National Forest Lands without having first obtained an Approved Plan of Operations from the United States Forest Service.

(c). From conducting any business operations whatsoever upon said subject area without first obtaining a permit from the United States Forest Service, and are enjoined from maintaining in the area the structures installed on said lands for the purpose of advertising

and conducting a mill site business operation upon said lands without a permit.

(d). From further disturbing, and/or damaging in any manner or way whatsoever the surface of the said National Forest Lands and from defacing and injuring the same, or the vegetation thereon, and from conducting any kind of mining operations upon said lands without first obtaining an Approved Plan of Operations from the U. S. Forest Service in accordance with 36 C.F.R., Section 252.5.

(e) From maintaining any heavy duty equipment, including bulldozers and tractors, and/or other mining equipment whatsoever upon said National Forest Lands without having obtained an Approved Plan of Operations from the United States Forest Service.

(f) From doing any welding without a permit upon the subject National Forest Lands.

(g). From threatening, assaulting, intimidating, harassing or in any manner whatsoever interfering with Forest Service Officers in their inspection of, traveling over and across, and/or administration of the National Forest Lands which are the subject of this litigation. The defendants are enjoined from impeding or obstructing in any way whatsoever the acts of agents and employees of plaintiff within the scope of their employment in the area.

(h) From failing to comply in each and every respect with the provisions of the Regulations of the Secretary of Agriculture contained in Volume 36 of the Code

of Federal Regulations.

4. The Court reserves jurisdiction to determine the issue of damages and to award and tax costs of suit herein.

5. The Court reserves jurisdiction to enforce all its orders as set forth in this Partial Summary Judgment for Injunctive Relief.

Dated: This 7th day of March, 1977.

Laughlin E. Waters
United States District
Court Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

United States of Ameria, Plaintiff, v. Goldfield Deep Mines Company of Nevada, A Nevada Corporation, C. Orin Swain, et c., et al., Defendants.	Civil No. 77-0307-LEW Dated March 8, 1977

WRIT OF ASSISTANCE Filed March 24, 1977

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE UNITED STATES MARSHALL FOR THE CENTRAL DISTRICT OF CALIFORNIA, GREETINGS:

WHEREAS, on the 26th day of January, 1977, plaintiff, United States of America, filed its Complaint For Trespass, For Damages, and For Injunctive Relief, and

WHEREAS, on March 7, 1977, the Court signed and issued a Partial Summary Judgment for Injunctive Relief, providing among other things, the following:

"3. The defendant, Goldfield Deep Mines Company of Nevada, a Nevada Corporation, and each of the defendants herein named, and all persons and entities of whatsoever nature in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise, and all officers, agents, servants, employees, accountants, assignees,

lessees and attorneys of Goldfield Deep Mines Company of Nevada, a Nevada Corporaton, are each and all hereby restrained and enjoined:

(a) From building, reconstructing, maintaining or using roads upon the subject Natonal Forest Lands without first obtaining an Approved Plan of Operations from the United States Forest Service in writing.

(b) From further digging, extracting materials and/or removing, and/or disposing of any materials whatsoever from the said National Forest Lands without having first obtained an Approved Plan of Operations from the United States Forest Service.

(c) From conducting any business operations whatsoever upon said subject area without first obtaining a permit from the United States Forest Service, and are enjoined from maintaining in the area the structures installed on said lands for the purpose of advertising and conducting a mill site business operation upon said lands without a permit.

(d) From further disturbing, and/or damaging in any manner or way whatsoever the surface of the said National Forest lands and from defacing and injuring the same, or the vegetation thereon, and from conducting any kind of mining operations upon said lands without first obtaining an Approved Plan of Operations from the U. S. Forest Service in accordance with 36 C.F.R. Section 252.5

(e) From maintaining any heavy duty equipment, including bulldozers and tractors, and/or other mining equipment whatsoever upon said National Forest Lands without having obtained an Approved Plan

of Operations from the United States Forest Service.

(f) From doing any welding without a permit upon the subject National Forest Lands.

(g) From threatening, assaulting, intimidating, harassing or in any manner whatsoever interfering with Forest Service Officers in their inspection of, traveling over and across, and/or administration of the National Forest Lands which are the subject of this litigation. The defendants are enjoined from impeding or obstructing in any way whatsoever the acts of agents and employees of plaintiff within the scope of their employment in the area.

(h) From failing to comply in each and every respect with the provisions of the Regulations of the Secretary of Agriculture contained in Volume 36 of the Code of Federal Regulations."

NOW YOU, THE UNITED STATES MARSHALL FOR THE CENTRAL DISTRICT OF CALIFORNIA, ARE HEREBY COMMANDED AND REQUIRED TO:

1. Close for use all roads constructed, reconstructed, maintained and/or used by defendants in, and across the National Forest Lands described in the Partial Summary Judgment for Injunctive Relief.

2. Cause the removal from the area of all the structures , and the mill installed by the defendants upon said National Forest Lands for the purpose of advertising and conducting a mill site business operation upon said lands.

3. Cause the removal from said National Forest Lands of all defendants' heavy duty mining equipment, including bulldozers, tractors, trucks and/or all other mining equipment whatsoever of defendants

upon said National Forest Lands.

4. Cause the removal from said National Forest Lands of any and all welding equipment.

5. Assist and protect the officers and employees of the United States Forest in their inspection of said lands for the purpose of prohibiting and preventing further digging, extracting of materials, and/or removing and/or disposing of any materials by defendants from said National Forest Lands.

6. Assist and protect the officers and employees of the subject National Forest Lands in their inspection of the subject lands in order to prevent the defendants from further disturbing, and/or damaging in any manner or way whatsoever the surface of said National Forest Lands or from defacing or injuring the same or vegetation thereon and from conducting any kind of mining operations upon said lands.

DATED: This 8th day of March, 1977
Director Courtoom Operations
for Edward M. Kritzman,
Clerk, United States
District Court Central
District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GOLDFIELD DEEP MINES CO. OF NEVADA, etc., et al., Defendants.	Case No. CV-77-307-LEW VERDICT February 24, 1978

We the jury in the above entitled case, find:

1. That the National Forest Lands here involved were damaged in the period of occupancy and operations thereon by the defendants during the year between March 1976 through March 1977 except insofar as found hereafter.

2. Damage was caused by the defendants to the countours of said National Forest Lands.

We further find that the costs of restoring the contours of said National Forest Lands as nearly as possible to the conditions which existed prior to said occupancy and operations of the defendants are found to be the sum of $6,130.00

3. Damage was caused to the vegetation of said National Forest Lands.

We further find that the costs of reseeding and revegetation of said National Forest Lands are found to be the sum of $2,475.00.

4. Plaintiff did experience costs in regaining possession of its National Forest Lands and to enforce injunctive relief granted by the Court.

We further find that the costs to plaintiff to regain possession of its National Forest Lands and to enforce the injunctive relief granted by the Court are the sum of $8,955.

5. Each and all of the defendants were here associated together in a common plan and arrangement to carry out the activities and operations of the defendant, Goldfield Deep Mines Co. of Nevada, a Nevada Corporation upon plaintiff's National Forest Lands.

We further find that each and all of the defendants are jointly and severally liable to plaintiff for the total damages hereinabove set forth in the amount of $17,560.00.

Dated: February 24, 1978
At Los Angeles, California

Cl..(illegible)
FOREMAN OF THE JURY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GOLDFIELD DEEP MINES CO., etc. et al., Defendants.	Case No. CV 77-307-LEW

JUDGMENT ON THE VERDICT (For Plaintiff)
Entered April 18. 1978 nunc pro tunc 2-24-78

This cause having been fried by the Court and a Jury before the Honorable Laughlin E. Waters, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict, now, therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff SEE SEPARATE VERDICT

and recover of and from the defendants SEE SEPARATE VERDICT the sum of $ SEE SEPARATE VERDICT, together with costs, taxed in the sum of $515.72.

Edward M. Kritzman, Clerk
United States District Court

by Paul F. Smith
Deputy Clerk

Dated 4-18-78

CALIFORNIA CORPORATIONS CODE

Sec. 2203 (in pertinent part)

"(a) Any foreign corporation which transacts intrastate business and which does not hold a valid certificate from the Secretary of State may be subject to a penalty of twenty dollars ($20) for each day that such unauthorized intrastate business is transacted; and such foreign corporation, by transacting unauthorized intrastate business, shall be deemed to consent to jurisdiction of the courts of California in any civil action arising in this state wherein such corporation is named a party defendant.

* * * * *

"(c) A foreign corporation subject to the provisions of Chapter 21 (commencing with Section 2100) which transacts intrastate business without complying with Section 2105 shall not maintain

any action or proceeding upon any intrastate business so transacted in any court of this state, commenced prior to compliance with Sec. 2105, until it has complied with the provisions thereof..."

UNITED STATES CODE

Section 22. Lands open to purchase by citizens.

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation, and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as they are applicable and not inconsistent with the laws of the United States.

Section 612(b)

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States.) Any such mining claim shall also be subject, prior to issuance of patent therefor, to

the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land; Provided however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mimimg or processing operations or uses resonably incident thereto:

* * * *

Section 612(o) Severance or removal of timber:

Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent thereof, sever remove, or use any vegetative or other surface resources thereof .. which are subject to managment or dispositon by the United States under subsection (b) of this section. Any severance or removal of timber which is permitted under the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management. (Emphasis supplied).

36 C.F.R.Part 252 Minerals (in pertinent part).

252.3 Definitions

* * * *

"b) Operator. a person conduction or proposing to conduct operations.

c) Person. Any individual, partnership, corporation, association or other legal entity."

252.4 Plan of Operations--Notice of Intent--Requirements

"(a) Except as provided in paragraph (2) of this section, a notice of intention to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources. Such notice of intention shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. If the District Ranger determines that such operations will likely cause significant disturbance of surface resources, the operator shall submit a proposed plan of operations to the District Ranger.

(1) The requirements to submit a plan of operations shall not apply (i) to operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest purposes, (ii) to individuals desiring to search for and occasionally remove small mineral samples or specimens, (iii) to prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study, (iv) to marking and monumenting

a mining claim and (v) to subsurface operations which will not cause significant surface resource disturbance.

(2) A notice of intent need not be filed (i) where a plan of operations is submitted for approval in lieu thereof, (ii) for operations excepted in paragraph (1) of this section from the requirement to file a plan of operations, (iii) for operations which will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes and will not involve the cutting of trees. Each notice of intent to operate shall provide information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations, and the method of transport. If a notice of intent is filed the District Ranger will within 15 days of receipt thereof, notify the operator whether a plan of operations is required.

(b) Any person conducting operations on the effective date of these regulations who would have been required to submit a plan of operations under §252.4 (a), may continue operations but shall within 120 days thereafter submit a plan of operations to the District Ranger having jurisdiction over the area within which operations are being conducted; Provided, however, That upon a showing of good cause the authorized officer will grant an extension of time for submission of a plan of operations, not to exceed an additional 6 months. Operations may continue according to the submitted plan during its review, unless the authorized officer determines that the operations are unnecessarily or unreasonably causing irreparable damage to surface resources and advises

the operator of those measures needed to avoid such damage. Upon approval of a plan of operations, operations shall be conducted in accordance with the approved plan. The requirement to submit a plan of operations shall not apply (1) to operations excepted in §252.4(a) or (2) to operations concluded prior to the effective date of the regulations in this part.

(c) The plan of operations shall include: (1) the name and legal mailing address of the operators(and claimants if they are not the operators) and their lessees, assigns, or designees.

(2) A map or sketch showing information sufficient to locate the proposed area of operations on the ground, existing and/or proposed roads or access routes to be used in connection with the operations as set forth in §252.12 and the approximate location and size of areas where surface resources will be disturbed.

(3) Information sufficient to describe or identify the type of operations proposed and how they would be conducted, the type and standard of existing and proposed roads or access routes, the means of transportation used or to be used as set forth in §252.12, the period during which the proposed activity will take place, and measures to be taken to meet the requirements for environmental protection in %252.8.

(d) The plan of operations shall cover the requirements set forth in paragraph (c) of this section, as foreseen for the entire operation for the full estimated period of activity: Provided, however, That if the development of a plan for an entire opera-

tion is not possible at the time of preparation of a plan, the operator shall file an initial plan setting forth his proposed operation to the degree reasonably foreseeable at that time, and shall thereafter file a supplemental plan or plans whenever it is proposed to undertake any significant surface disturbance not covered by the initial plan."

* * * * * * *

252.11 Prevention and control of fire.
Operator shall comply with all applicable Federal and State fire laws and regulations and shall take all reasonable measures to prevent and suppress fires on the area of operations and shall require his employees, contractors and subcontractors to do likewise.

252.12 Access.
An Operator is entitled to access in connection with operations, but no road, trail, bridge, landing area for aircraft, or the like, shall be constructed or improved, nor shall any other means of access, including but not limited to off-road vehicles, be used until the operator has received approval of an operating plan in writing from the authorized officer when required by §252.4(a). Proposals for construction, improvement or use of such access as part of a plan of operations shallinclude a description of the type and standard of the proposed means of access, a map showing the proposed route of access, and a description of the means of transportation to be used. Approval of the means of such access as part of a plan of operations shall specify the location of the access route, design standards, means of trans-

portation, and other conditions reasonably necessary to protect the environment and forest surface resources, including measures to protect scenic values and to insure against erosion and water or air pollution."

Opposition

Office-Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1981

GOLDFIELD DEEP MINES COMPANY OF NEVADA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly concluded that the United States Forest Service was authorized to adopt reasonable rules and regulations regarding mining operations within national forests.

2. Whether a partial summary judgment holding petitioners liable for violations of the Forest Service's mining regulations and enjoining petitioners from conducting and maintaining a mill and mining operation on unpatented mining claims within a national forest deprived petitioners of due process.

3. Whether the judicially authorized seizure and sale of petitioners' mining and mill equipment, approved pursuant to the partial summary judgment order, deprived petitioners of due process.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-8) is reported at 644 F. 2d 1307. The findings of fact and conclusions of law of the district court (Pet. App. A-11 to A-17) are not reported.

JURISDICTION

Judgment was entered by the court of appeals on May 11, 1981. A petition for rehearing was denied on July 14, 1981 (Pet. App. A-9). The petition for a writ of certiorari was filed on October 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In March 1976, Goldfield Deep Mines Company of Nevada, a Nevada Corporation, recorded a quitclaim deed to several unpatented mining claims in the National Forest

Reserve in San Bernardino, California.[1] Following acquisition of the claims, Goldfield, through its various officers, directors and agents (hereafter referred to collectively as "petitioners"), moved mining equipment, bulldozers and other vehicles onto the area and commenced excavating materials, destroying trees and vegetation, and cutting roads in connection with its mining activities. In addition, petitioners constructed a mill on the site, consisting of crushing equipment, conveyers, bins and concrete pads, to process materials mined at other claims. These mining and milling activities were pursued without the necessary Forest Service permits, thus violating several then applicable Forest Service regulations, including 36 C.F.R. 261.10(c) (1977) which prohibited any person from operating a business enterprise on national forest lands unless authorized by permit, and 36 C.F.R. 252.5 (1977) and 252.12 (1977) which prohibited excavating minerals and constructing roads without an approved "plan of operations."[2] Despite several warnings

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[1]These claims were subsequently declared invalid by an administrative law judge. *Ernest C. Downs*, United States Department of the Interior, Office of Hearings and Appeals, Contest Nos. CA-4185 and CA-4290 (Feb. 14, 1979). A copy of this decision has been lodged with the Clerk of this Court. An appeal of the decision is currently pending before the Interior Board of Land Appeals.

[2]In 1974, the United States Forest Service, Department of Agriculture, issued final regulations concerning the use of national forest lands by persons operating under the General Mining Law of 1872, 30 U.S.C. 22 *et seq.* These regulations, which applied to petitioners, were codified at 36 C.F.R. 252 *et seq.* (1977). The regulations have since been modified and recodified at 36 C.F.R. 9 *et seq.* The regulations applicable to petitioners required prospectors and miners to submit a "notice of intention to operate" to the Forest Service District Ranger having jurisdiction over the area where their activities might cause disturbance of surface resources. If the District Ranger determined that such operations would cause significant disturbance of surface resources, the

from the Forest Service regarding the need for an approved plan of operations and a permit to conduct their milling activities, petitioners refused to comply with any of the Forest Service's regulations.[3]

As a consequence, the United States commenced this action against petitioners, seeking: (1) a declaration that petitioners' conduct constituted an unlawful trespass on

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operator was required to file a "plan of operations." 36 C.F.R. 252.4 (1977) (Pet. App. A-31 to A-35).

A plan of operations was to include: (1) a map sufficient to locate the proposed area of operations, existing or proposed roads, and the approximate location and size of the surface area to be disturbed, and (2) information sufficient to describe the type of operations proposed, how they would be conducted, the type of access roads required, the period of proposed activity, and the measures that would be taken to meet the environmental protection requirements of 36 C.F.R. 252.4(c) (1977) (Pet. App. A-33).

The environmental protection requirements of the original regulations essentially provided for compliance with state and federal environmental laws. In addition, they called for a number of scenic, site cleanup, and reclamation requirements. See 36 C.F.R. 252.8 (1977). For example, road construction had to assure adequate drainage to minimize damage to soil, water and other resources (*id.* at 252.8(f)). Further, no roads could be built without an approved plan of operations (*id.* at 252.12). Finally, an operator was required to comply with all applicable state and federal fire laws (*id.* at 252.11).

[3]In addition to the foregoing violations, petitioners conducted welding activities on the claims without a county fire permit, in violation of 36 C.F.R. 252.11 (1977) and the Uniform Fire Code of San Bernardino, Ordinance 2011. Petitioners also violated 36 C.F.R. 261.1 (1977) by preventing Forest Service officers from inspecting the claims. Finally, petitioners pursued their mining activities at a time when Goldfield Deep Mines Company was not qualified to conduct intrastate business in California, in violation of Cal. Corp. Code §2203 (West Supp. 1977) (Pet. App. A-28). In June 1978, the President and Chairman of the Board of Goldfield Deep Mines Company were found guilty of securities fraud and were ordered to cease selling securities in California.

national forest lands; (2) an injunction forbidding petitioners from conducting any further mining or business activities on the alleged mining claims; and (3) damages for the value of resources destroyed and restoration costs.[4] Thereafter, the United States moved for partial summary judgment, asking for a judgment that petitioners' mining and business activities on national forest lands were in violation of Forest Service regulations and seeking injunctive relief against continuation of such violations. The motion was accompanied with documents and affidavits supporting each of the allegations (R. 53-97).[5]

Petitioners filed pro se "answers" to the motion for partial summary judgment denying "each and every allegation" in the complaint and motion (R. 207). They did not, however, counter any of the United States' affidavits with affidavits of their own or present any other evidence.

Following a hearing, the district court granted the United States partial summary judgment and injunctive relief, holding petitioners liable for trespass (Pet. App. A-11 to A-17) and enjoining petitioners from conducting and maintaining a mill and mining operation on the claims without the necessary Forest Service permits (Pet. App. A-18 to A-19).

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[4]Petitioners failed to file timely answers to the complaint and on February 24 and 28, 1977, the clerk of the district court entered orders of default against them. At trial, petitioners' attorney conceded that default was properly entered against petitioners on the original complaint (Tr. 6 and 374).

[5]A week before the hearing on the partial summary judgment motion, the United States filed a supplemental paper to inform the court that a proceeding to challenge the validity of petitioners' mining claims had been initiated by the United States Department of the Interior on February 10, 1977. The United States did not make any additional request for relief in its supplemental motion.

Pursuant to the partial summary judgment order, the United States sought and was granted a writ of assistance empowering the United States Marshal to carry out the district court's order (Pet. App. A-22 to A-25).[6] The writ directed the marshal to close all new roads and remove the mill and other structures as well as all heavy mining equipment from the area (R. 165-168). Under that writ, petitioners were given a week to vacate the claims (R. 780). Upon petitioners' failure to remove the mill, vehicles and other equipment from the area, the United States Marshal contracted to have the property removed and stored. When petitioners failed to pay the removal costs or obtain release of the property, the United States moved to sell the property to defray removal and storage costs as well as any damages awarded to the United States (R. 403). On June 8, 1977, following a hearing the court issued an order permitting the sale of the property (R. 453-455). Although petitioners were served with notice of the sale, no one representing petitioners appeared at the sale. The United States received $750 for the property.

Following the sale, the government filed an amended complaint for the cost of enforcing the partial summary judgment and for the anticipated cost of restoring the severely damaged forest land to its original condition. Over

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[6]Petitioners countered the partial summary judgment order and writ of assistance with a series of pro se motions before the district court and the court of appeals, including motions to alter and vacate the partial summary judgment decree and to stay execution of the writ of assistance. The United States filed responses to each of petitioners' motions. In addition, the United States filed a motion to strike all materials filed on behalf of the corporation on the ground that the company was not properly before the district court because it was not represented by legal counsel (R. 276-277). Following a hearing, the district court denied the petitioners' motions and granted the United States' motion to strike (R. 381). The United States delayed execution of the writ until petitioners' petition for a writ of mandamus to stay execution of the writ of assistance was denied by the court of appeals (Pet. App. A-10).

petitioners' objections, the district court refused to try again the trespass issue settled in the earlier partial summary judgment proceeding, and in February 1978 a jury trial was held solely on the damage issue. At the conclusion of the trial, the jury returned a verdict for the United States for $17,560, and judgment was entered in that amount.

The court of appeals affirmed the district court in all respects (Pet. App. A-1 to A-8), rejecting petitioners' contentions that the Forest Service lacked authority to regulate mining operations within national forests and that the proceeding below violated their right to due process. The court held that partial summary judgment had been properly entered on the basis of the documentation and affidavits submitted by the government, and concluded that the seizure and sale of petitioners' property after notice and a hearing comported with the requirements of due process (Pet. App. A-7 to A-8). In addition, the court held that the Forest Service was authorized to adopt reasonable rules and regulations regarding mining on national forest lands and that the right to protect such lands from waste is separate from and in addition to the right to challenge the validity of the mining claims in an administrative contest proceeding (Pet. App. A-5 to A-7).

ARGUMENT

The decision below is correct, conflicts with no decision of this Court or any court of appeals and presents no issue warranting further review by this Court.

1. Petitioners argue that the court of appeals erred in upholding the Forest Service's authority to control mining and prospecting methods on national forest lands, because such regulation "operate[s] to repeal the mining law enacted by Congress" (Pet. 28-30). While the mining laws are generally applicable within national forests, Congress since 1897

has recognized that there are competing interests on national forest lands that must be balanced against mining activities. In the Organic Administration Act of June 4, 1897, ch. 2, 30 Stat. 34, Congress stated that the national forests were established to improve and protect our forest land, to secure "favorable conditions of water flows and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. 475. See *United States* v. *New Mexico*, 438 U.S. 696, 706-708 (1978). To effectuate the purposes of the Act, Congress authorized the Secretary of Agriculture to "make such rules and regulations and [to] establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. 551. In addition, Congress provided that persons entering national forests to prospect, locate and develop mineral resources therein are subject to and "must comply with the rules and regulations covering the national forests." 16 U.S.C. 478.

Pursuant to 16 U.S.C. 478 and 551, the Forest Service has adopted comprehensive regulations designed to minimize the adverse environmental impact of mining activities on national forest lands. See 36 C.F.R. 9 *et seq.* The Forest Service's authority to regulate mining activities on national forest lands pursuant to 16 U.S.C. 478 and 551 and these regulations has been consistently affirmed. *United States* v. *Weiss*, 642 F. 2d 296 (9th Cir. 1981); *United States* v. *Curtis-Nevada Mines, Inc.*, 415 F. Supp. 1373, 1379 (E.D. Cal. 1976), aff'd in relevant part, 611 F. 2d 1277 (9th Cir. 1980); *Ventura County* v. *Gulf Oil Corp.*, 601 F. 2d 1080, 1084 (9th Cir. 1979), aff'd, 445 U.S. 947 (1980); *United States* v. *Richardson*, 599 F. 2d 290, 293 (9th Cir. 1979), cert. denied, 444 U.S. 1014 (1980).

In view of the foregoing, petitioners' assertion that the Forest Service lacked authority to regulate petitioners' mining and milling activites is unfounded.

2. Petitioners also argue that the court of appeals erred in upholding the injunction against maintaining a mining and milling operation on their claims because they were entitled to remain on the claims until the Department of the Interior determined the validity of the claims (Pet. 20-24). Contrary to petitioners' contentions, however, the United States was entitled to seek enforcement of the Forest Service's minerals management regulations regardless of whether petitioners' unpatented claims were valid. See *United States* v. *Nogueira*, 403 F. 2d 816, 825 (9th Cir. 1968).[7]

Although locators of mining claims under the General Mining Law of 1872, 30 U.S.C. 22 *et seq.*, are granted broad possessory rights, unpatented mining claims are still subject to the paramount title of the United States. *United States* v. *Richardson, supra*, 599 F. 2d at 293 (and cases cited therein). Thus,

> [W]hile * * * location * * * withdrew the land from the public domain [so] that no rival claimant could successfully initiate any right to it until his location was avoided and his entry was canceled it gave him nothing but "the right to present and exclusive possession" for the purpose of mining. It did not devest the legal title of the United States, or impair its right to protect the land and its product, by either civil or criminal proceedings, from trespass or waste.

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[7]Petitioners' reliance (Pet. 22, 23) on *United States* v. *Barrows*, 404 F. 2d 749, 752 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969), and *United States* v. *Springer*, 478 F. 2d 43 (9th Cir. 1972), is misplaced. In *Barrows* and *Springer*, the United States' right to enjoin mining claimants from causing irreparable damage to federal lands pending an administrative determination of the validity of the claims was, in fact, upheld. Moreover, these cases did not involve the application and enforcement of Forest Service regulations which provide an independent basis for granting injunctive relief here.

Teller v. *United States*, 113 F. 273, 281 (8th Cir. 1901) (citations omitted). The district court was therefore open to the United States to enforce its rights under the Forest Service regulations. In addition, the district court was authorized to fashion an appropriate injunctive remedy to correct such violations. See *Texas & N.O.R.R.* v. *Railway Clerks*, 281 U.S. 548, 567-570 (1930); *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 544-545 (1937).

In these circumstances, the court of appeals properly upheld an injunction prohibiting petitioners from conducting or maintaining any mill operation on national forest lands until petitioners complied with the applicable Forest Service regulations. *United States* v. *Curtis-Nevada Mines, supra*, 415 F. Supp. at 1379; *United States* v. *Richardson, supra*, 599 F. 2d at 294.

3. Petitioners' further contention (Pet. 24-27) that removal of their mining equipment was not authorized by the district court's injunction is refuted by the record (Pet. App. A-19 to A-21). The district court expressly provided that petitioners are enjoined (*ibid.*):

> [f]rom conducting any business operations whatsoever upon said subject area without first obtaining a permit from the United States Forest Service; and are enjoined from maintaining in the area the structures installed on said lands for the purpose of advertising and conducting a mill site business operation upon said lands without a permit * * * [and][f]rom maintaining any heavy duty equipment, including bulldozers and tractors, and/or other mining equipment whatsoever upon said National Forest Lands without having obtained an Approved Plan of Operations from the United States Forest Service.

In accordance with the injunction, the United States sought and was granted a writ of assistance to carry out the

court's mandate (Pet. App. A-22 to A-25).[8] Petitioners' assertion that the writ was improperly executed without notice and an opportunity for a hearing in violation of their right to due process is also refuted by the record. Pursuant to the writ, petitioners were given a full week to remove their property themselves; only after petitioners failed to do so was the property removed for them. In addition, execution of the writ was delayed pending the outcome of petitioners' petition for a writ of mandamus before the Ninth Circuit to stay execution of the writ of assistance. In denying the writ of mandamus, the Ninth Circuit stated that the United States "may seek judicial assistance in obtaining immediate possession over [the] disputed mining claim" (Pet. App. A-10 to A-11). Accordingly, petitioners' reliance (Pet. 25), on *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), is misplaced. Here, the petitioners had notice of the seizure. Moreover, the seizure was judicially authorized. Petitioners' contention that the seizure violated their rights to due process was, therefore, properly rejected by the court of appeals.[9]

4. Finally, petitioners argue that, because each of the individual petitioners was not required to file an approved plan of operation, they could not be held personally liable for violating the regulations or for trespass (Pet. 30).[10] The

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[8]Because petitioners were enjoined from maintaining any structures or equipment on the claims, contrary to petitioners' assertions (Pet. 25), a writ of assistance requiring removal of such items and return of the property to the United States was proper. Fed. R. Civ. P. 70.

[9]Petitioners apparently do not now challenge the sale of their property.

[10]Petitioners' contention that the district court denied Goldfield Deep Mines Company due process in finding that it was doing business in California without having qualified to do intrastate business in violation of Cal. Corp. Code §2203 (West Supp. 1977) is without merit. Contrary to petitioners' contention, Goldfield Deep Mines Company was not prohibited from defending itself in this action (Pet. 20). The

argument is erroneous. Although, as a practical matter, each agent of a corporation is not required to obtain a plan of operation on national forest lands, agents who conduct such mining and milling activities in violation of Forest Service regulations can be individually liable for actions constituting a trespass (*Murphy Tugboat* v. *Shipowners & Merchants Towboat*, 467 F. Supp. 841, 852 (N.D. Cal. 1979), quoting H. Ballantine, *Corporations* § 112 (rev. ed. 1946)):

> [a]n officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf.

See also *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F. 2d 902, 907 (1st Cir. 1980).

The government's evidence showed that each of the individual petitioners, while acting as an officer or agent for Goldfield Deep Mines Company, either encouraged, condoned, or in some other manner participated in the corporation's unlawful mining and milling operation (R. 53-97). Moreover, the petitioners never expressly denied their individual participation in the corporation's activities. Under these circumstances, the petitioners were properly found to be jointly and severally liable for the commission of the trespass. *NLRB* v. *Cranston Print Work Co.*, 258 F. 2d 206, 213 (4th Cir. 1958).

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corporation was simply found to be in violation of Forest Service regulations which prohibit any business enterprise from operating on national forest lands without a Forest Service permit. 36 C.F.R. 261.10(c) (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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